Beyond Silly—What the Courts and the FEC Have Done to Congressional Reform Attempts

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September 2002

Introduction

In this outline are presented some of the more peculiar aspects of current federal campaign finance law as it relates to corporations. Some involve rather odd analysis by the courts. Others involve strange actions by FEC commissioners. The net result is a crazy quilt of legal provisions that greatly depart from the intent of Congress and make the PLI seminar a must.

I. **"Quid pro quo" free zone.**

In Buckley v. Valeo, 424 U.S. 1 at 39-51 (1976) ("Buckley"), the Supreme Court overturned a $1,000 independent expenditure limit on the theory that there was little danger of "quid pro quo" arrangements if there was no coordination before the independent expenditure occurred.

A. While there might be some independent spenders who can resist taking credit for helping a candidate, surely the vast majority of such persons will be sure to let the candidate know after the fact how helpful

their "independent expenditure" was. Even if no effort is made to so inform the candidate, the candidate almost always will know who has made such expenditures. And the candidate will know the same thing may happen in the next election—perhaps in favor of the opponent! Is the danger of "quid pro quo" really different?

B. In spite of the negligible difference, in the real world, between coordinated expenditures and independent expenditures, campaign finance regulation still largely rests on this Supreme Court analysis. Thus, at least some persons (individuals and PACs) may make unlimited independent expenditures and then feel free to seek "quid" from candidates/officeholders after the fact based on such expenditures.

II. **Treating "independent expenditures" by corporations differently.**

In FEC v. Massachusetts Citizens for Life, 479 U.S. 238 at 248-249 (1986) ("MCFL"), and Austin v. Michigan Chamber of Commerce, 494 U.S. 652 at 657-661 (1990) ("Austin"), the Supreme Court ruled that non-coordinated "express advocacy" expenditures by corporations can be flatly prohibited.

A. Thus, while individuals and PACs may make unlimited independent "express advocacy" communications, corporations may not make any.

B. The Court has rationalized this on the ground that corporations are commercial entities that can gather and spend enormous sums and

thereby have a disproportionate, distorting influence in the political marketplace. MCFL, 479 U.S. at 256-259; Austin, 494 U.S. at 659, 660.

C. One might ask why there is little risk of "quid pro quo" in the case of a $1 million corporate executive or PAC independent expenditure, but an unacceptable risk in the case of a $1 million corporate independent expenditure. Or, one might ask why there is a disproportionate, distorting influence in the political marketplace by a $1 million corporate independent expenditure, but not by a $1 million independent expenditure by a corporate executive or PAC.

III. **Reading "express advocacy" so narrowly that the statute is meaningless.**

In upholding the "independent expenditure" reporting provision, 424 U.S. at 74-82, Buckley narrowed it to reach only "express advocacy." Later, in MCFL, the Court ruled that independent expenditures by corporations are only prohibited under 2 U.S.C. § 441b if the communication involved rises to the level of "express advocacy." 479 U.S. at 248, 249. Some are reading this term so narrowly that virtually anyone can avoid its reach.

A. Congress used this test to redraft the statute in 1976. Thus, the "independent expenditure" reporting provisions at 2 U.S.C. § 434(b)(6)(B)(iii) and (c) (relying on the definition at 2 U.S.C. § 431(17)) and the disclaimer provisions at 2 U.S.C. § 441d incorporate the "express advocacy" rule.

B. In an early test the FEC brought an enforcement case against a tax cut group that had issued a Fall '76 pamphlet criticizing the voting record of an incumbent congressman and urging readers to "let him know how you feel." An angry 2nd Circuit held the pamphlet to fall outside the "express advocacy" realm, and one judge labeled the FEC's position "perverse." FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 at 52 (2nd Cir. 1980)(Chief Judge Kaufman concurring).

C. In MCFL, *supra*, decided six years later, the Supreme Court found a September '78 publication to be "express advocacy" where it identified certain candidates as 'pro-life' and then urged readers to vote 'pro-life.' 479 U.S. at 249, 250. The Court so held even though the publication said, "This special edition does not represent an endorsement of any particular candidate."

D. In the 9th Circuit, a newspaper ad criticizing candidate Jimmy Carter's 1980 campaign practices and urging "Don't Let Him Do It" was found to be "express advocacy." FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987).

E. The FEC, meanwhile, fumbled a few enforcement cases. For example, in MUR 3162 (closed 6/4/91) the FEC split 3-3 on whether a flyer distributed the week before the general election by a group called Citizens for Informed Voting in the Commonwealth,

comparing opposing candidates in several federal races and rating them from "very bad" to "excellent," was "express advocacy." *See also*, Thomas and Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine,?* STANFORD LAW & POLICY REVIEW, Vol. 10:1 (1998).

F. The FEC finally promulgated a regulation defining "express advocacy." It uses a 'reasonable person' test. It reaches communications that "when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) . . . ." 11 C.F.R. § 100.22(b).

G. The 1st Circuit held this interpretation to be unconstitutional. Maine Right to Life Committee, Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997). The 4th Circuit has indicated it too finds the 'reasonable person' approach unconstitutional. Virginia Society for Human Life v. FEC, 263 F.3d 379 (2001). The 8th Circuit likewise held an identical state provision unconstitutional. Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999). These courts all indicated that so- called 'magic words' like those referenced in a footnote in Buckley ("vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject"), 424 U.S. at 44, n. 52, must be present to find "express advocacy."

H. By split votes, the FEC has twice denied petitions to rescind its regulation in light of the foregoing judicial divergence. 63 Fed. Reg. 8363 (2/19/98); 64 Fed. Reg. 27478 (5/20/99). This follows standard agency practice of seeking review of a regulation in several circuits in order to facilitate Supreme Court resolution of a difficult issue. *See* United States v. Mendoza, 464 U.S. 154 (1984).

I. As things stand, the FEC's definition of express advocacy applies in federal circuits other than the 1st, 4th, and 8th. Tell your clients to get a good map. The FEC can bring enforcement actions where the respondent "is found, resides, or transacts business." 2 U.S.C. § 437g(a)(6)(A).

J. Before getting too nervous, however, note that the FEC in two fairly recent enforcement cases split 3-3 on treating rather obvious campaign advocacy as "express advocacy." *See* Thomas Statements of Reasons in MUR 4922 (Suburban O'Hare Commission) and MUR 4982 (Republicans for Clean Air), www.fec.gov/members/Thomas.

IV. **Special exception for special corporations.**

In MCFL, *supra*, the Supreme Court carved an exception to 2 U.S.C. § 441b for certain non-profit ideological corporations—ones like Massachusetts Citizens for Life—whereby unlimited non-coordinated "express advocacy" communications can

be sponsored. 479 U.S. at 263, 264. The Court noted several "essential" features of MCFL: (1) it was formed for the express purpose of promoting political ideas and cannot engage in business activities; (2) it had no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and (3) it was not established by a business corporation or labor union and had a policy against accepting contributions from these entities.

A. The FEC implemented this part of the MCFL ruling with a regulation defining "qualified nonprofit corporation" and exempting independent expenditures by such entities. 11 C.F.R. § 114.10. The FEC's regulation interprets the Supreme Court allowance to apply only to 501(c)(4) organizations that offer no benefits like credit cards or insurance policies and that can prove they do not accept **any** donations from business corporations or labor organizations or prove they have a policy to that effect. 11 C.F.R. § 114.10(c). The strict rule precluding any donations from business corporations or labor organizations has landed in several courts.

B. This regulation was challenged in Minnesota Citizens Concerned for Life v. FEC, 113 F. 3d 129 (8th Cir. 1997). The court struck the FEC regulation as violative of the First Amendment rights of certain nonprofit corporations. In essence, the 8th Circuit believed the MCFL exemption should extend to organizations that undertake an "insignificant" amount of business activity or that accept an "insignificant" amount of donations from business corporations.

C. Although not dealing with the FEC's regulation, the 2nd Circuit in FEC v. Survival Education Fund, Inc., 65 F. 3d 285 (2nd Cir. 1995), earlier had interpreted MCFL in a similar way. The court found no violation of § 441b where there had been no showing the organization received a "significant" amount of funding from business corporations.

D. Last year, the D.C. Circuit distinguished between corporate receipts of $1,000 in a year and corporate receipts of $7,000 in a year, extending MCFL protection in the former situation (because "de minimis") but not in the latter. FEC v. National Rifle Association of America, 254 F.3d 173 (D.C. Cir. 2001).

E. The 4th Circuit recently held the regulation unconstitutional as applied to North Carolina Right to Life Inc. Beaumont v. FEC, 278 F.3d (4th Cir. 2002). Note, this decision overturned the constitutionality of the prohibition of corporate **contributions** as well as the prohibition of corporate **independent expenditures** as applied to North Carolina Right to Life. Note further, there were only two commissioners willing to vote to seek Supreme Court review of this decision. This is the first time in the history of the FEC that commissioners were not willing to defend the constitutionality of a statutory contribution restriction. Stay tuned to this one, as it could have far-reaching ramifications.

F. The FEC thus far has declined to rescind the regulation at 11 C.F.R. § 114.10(c), again

relying on the standard agency practice of defending an approved regulation in several circuits in order to generate definitive interpretation by the Supreme Court. 63 Fed. Reg. 29358 (May 29, 1998). The FEC relied also on the Supreme Court's ruling in Austin, *supra*, where a state statute like § 441b withstood challenge "[b]ecause the Chamber accepts money from for-profit corporations [and] could, absent application of [the state corporate expenditure prohibition], serve as a conduit for corporate political spending." 494 U.S. at 664. Thus, outside the 8th, 2nd, 4th, and D.C. Circuits, the FEC can continue to apply its regulation rigidly. Get out that map again.

V. **Just about everybody can qualify as a "member."**

In Chamber of Commerce of the United States v. FEC, 69 F.3d 600 (D.C. Cir. 1995), the FEC's former regulation defining "member" for purposes of exempt member communications under 2 U.S.C. § 431(9)(B)(iii) was held to be an unreasonable interpretation of the statute as it applied to the Chamber's claimed members and some of the American Medical Association's claimed members. The court was troubled by the part of the former regulation that required these two organizations' "members" to have the right to vote for at least one person on the respective governing body. In response, by a split vote, the FEC broadly revised its "member" rules and, going well beyond what was needed to comply with the court case, opened up the term to virtually anyone an organization wants to call a member. *See* 64 Fed. Reg. 41266 (7/30/99) for

history, explanation and justification, and final rules, now codified at 11 C.F.R. §§ 100.8(b)(4)(iv) and 114.1(e)(1).

A. Whereas before, a person paying dues of as little as a penny per year also must have had some right to participate in the governance of the organization, now such person only need pay the one penny per year dues. There is no minimum amount of dues and no need to participate in governance in any way.

B. Whereas before, to qualify as a "member" without paying any dues, a person would have required very substantial rights to vote in governance of the organization (voting on all board members), now such person need only have the right to participate in "aspects of the organization's governance" *similar* to showing approval of the budget. Not only is this unclear; it potentially makes "membership" open to anyone the organization can show has some "approval" rights.

C. With the ability to claim as "members" virtually anyone willing to pay a penny a year or anyone given some "approval" rights, the broad prohibition at 2 U.S.C. § 441b is in danger of being swallowed by the membership communication exception.

VI. **Proving something to be "coordinated" is becoming harder; spending unlimited amounts is thus becoming easier.**

A. In Buckley, *supra*, the Supreme Court noted the potential for evasion of the contribution limits "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. at 46. The Court observed, "such controlled or coordinated expenditures are treated as contributions . . . under the Act." Id. In the 1976 Amendments, Congress set forth its definition of coordination at 2 U.S.C. §§ 431(17) and 441a(a)(7)(B)(i). The latter provides: [E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."

B. The FEC in 1980 implemented this statutory concept of coordination at former 11 C.F.R. § 109.1(b)(4) and (d). Certain presumptions of coordination were created, e.g., where the expenditure is undertaken by or through someone authorized by the candidate's agents to raise or expend funds, or someone who has received compensation from the candidate's campaign or the candidate's agent. *See* FEC v. National Conservative Political Action Committee, 647 F. Supp. 987 (S.D.N.Y. 1986) (in-kind contribution found where same consultant used by candidate's campaign).

C. In Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996), dealing with ads attacking the other party's likely nominee, the Supreme Court

invalidated the FEC's presumption of coordination between a state party committee and its candidates where the party had not yet even nominated a candidate for the general election. In so doing the Court noted that independent spending is "developed . . . not pursuant to any general or particular understanding with [the candidate or the candidate's agents]." Though this was not a corporate spending case, the question remaining is whether the Supreme Court ultimately will require some sort of "understanding" in order to find coordination in the corporate spending context. Will there have to be an understanding regarding particular ads to be run on particular days? *See* Thomas and Bowman, *Coordinated Expenditure Limits: Can They be Saved?*, CATHOLIC UNIV. LAW REVIEW, Vol. 49, No. 1 (1999).

D. Courts routinely have upheld FEC decisions to drop enforcement cases where evidence of coordination was weak. See Common Cause v. FEC, 655 F. Supp. 619 (D.D.C. 1986), rev'd. on other grounds, 842 F. 2d 436 (D.C. Cir. 1988) (absence of evidence of direct requests or scheming between Reagan campaign and several committees); Common Cause v. FEC, 715 F. Supp. 398 (D.D.C. 1989), rev'd. on other grounds, 906 F. 2d 705 (D.C. Cir.) (1990) (no evidence that common vendors or officials actually were used to coordinate expenditures with Republican Senate candidate). Though these cases did not deal with corporate spending, their rejection

of implied coordination probably would apply in such circumstances.

E. When revising its regulations in 1995 to incorporate the "express advocacy" test, the FEC also attempted to clarify the degree of coordination allowable with candidates or parties when undertaking candidate appearances (11 C.F.R. § 114.4(b)(1)(vii)), generic voter registration or get-out-the-vote communications (11 C.F.R. § 114.4(c)(2)), distribution of official voter information (11 C.F.R. § 114.4(c)(3)(v)), voting records (11 C.F.R. § 114.4(c)(4)), voter guides (11 C.F.R. § 114.4(c)(5)(i) and (ii)), endorsements (11 C.F.R. § 114.4(c)(6)(ii)), and registration or get-out-the-vote drives (11 C.F.R. § 114.4(d)(1)).

F. In Clifton v. FEC, 114 F. 3d 1309 (1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998), the 1st Circuit overturned certain aspects of the FEC's regulations concerning voting records (showing how legislators voted) and voter guides (comparing candidates on issues). The court held that "mere inquiries" to candidates about their legislative votes do not taint the independence of a voting record, and non-written contacts with candidates about their positions on issues do not necessarily taint the independence of voter guides. Left unclear, unfortunately, is just what does constitute impermissible coordination. The FEC has received a petition to rescind its voting record and voter guide regulations, but has not yet acted on it. 64 Fed. Reg. 46319 (8/25/99).

G. One U.S. district court provided its own theory of coordination when dealing with certain Christian Coalition activities undertaken in the 1990, 1992, and 1994 election cycles. The FEC, acting on a complaint, filed suit alleging some communications were coordinated and hence prohibited in-kind corporate contributions. In five instances the court found insufficient evidence of coordination. In one instance, involving the 1994 Oliver North Senate race, the court declined to rule on summary judgment. FEC v. Christian Coalition, Inc., 52 F.Supp.2d 45 (1999).

1. The court seemed to require either a request or suggestion from the candidate's operatives, exercise of control over the communication by the candidate's operatives, or "substantial discussion or negotiation between the campaign and the spender about such things as the contents, timing, location, mode, intended audience, or volume of the communication." 52 F.Supp.2d at 92.

2. By a split vote the FEC declined to appeal, even though the district court gave no consideration to the FEC's existing regulations defining coordination at 11 C.F.R. § 109.1 (b)(4). *See* Thomas and Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, WASH. COLL. OF LAW ADMIN. LAW REV., Vol. 52, No. 2 (2000).

H. The FEC in 2001 revised its coordination regulations as they relate to public communications paid for by persons other than party committees. *See* current 11 C.F.R. §§ 100.23 and 109.1(a), (b)(4); 65 Fed. Reg. 76146 (12/6/00); 66 Fed. Reg. 23537 (5/9/01). These new rules follow closely the approach of the district court in FEC v. Christian Coalition, Inc., *supra*. (Note: Section 214 of the Bipartisan Campaign Reform Act overturns the FEC's new coordination regulations after the 2002 election cycle and specifies that new regulations are not to require "agreement or formal collaboration.")

VII. **The opportunity to get 'soft money' donations to the parties in ways that will help specific candidates has grown dramatically in recent election cycles.**

A. The 'coordinated expenditure' limits for party spending on behalf of particular House and Senate candidates were upheld as constitutional in FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001). To the extent coordinated party communications count toward these limits, only federally permissible funds ('hard money') may be used. 2 U.S.C. § 441a(d); 11 C.F.R. § 102.5(a).

B. The FEC has badly mangled the law in this area. Until fairly recently, the FEC would treat party ads as subject to the 'coordinated expenditure' limits if they mentioned a clearly-identified candidate and contained an

"electioneering message." The "electioneering message" phrase was linked to Supreme Court language describing activity "designed to urge the public to elect a certain candidate or party." U.S. v. United Auto Workers, 352 U.S. 567, 587 (1957). The FEC had found several party ads to be subject to the 'coordinated expenditure' limits:

1. Republican Party ads criticizing particular Democratic presidential candidates and saying "Vote Republican." Advisory Opinion 1984-15, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5766;

2. Democratic Party mailer claiming oil spills could be in future if particular congressman has his way, saying "Don't be fooled by Republican rhetoric," and ending with "Let Congressman X know how you feel." Advisory Opinion 1985-14, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819;

3. Colorado Republican Party ad saying Senate candidate Tim Wirth had a right to run for the Senate, but not to lie. MUR 2186, later the subject of Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996).

C. In connection with compliance cases involving the notorious RNC-financed ads and DNC-financed ads in the 1996 election cycle, the FEC split 3-3 on treating such ads as

subject to the contribution or coordinated expenditure limits. *See* various commissioner Statements of Reasons in MURs 4553 & 4671, 4713, and 4407 & 4544 at www.bna.com/moneyandpolitics. These split votes were preceded by the issuance in the audit stage of a Statement for the Record by four commissioners saying the "electioneering message" phrase was inappropriate and too vague. *See* Mason et al. Statement of Reasons in the Audits of Dole for President and Clinton/Dole Committees, www.fec.gov/members/Mason; *see also* Thomas Statement for the Record in Audits of Clinton/Gore and Dole/Kemp (dissent), www.fec.gov/members/Thomas. Having left unclear what the legal analysis then should be, this Statement provided a basis for some to argue that the law was simply too unsettled to enforce at all.

D. If the FEC had found that the RNC and DNC ads in 1996 were in fact subject to the coordinated expenditure limits, there would have been some restraint in the 2000 election cycle. Even with little or no penalty assessed for what happened in 1996, such an interpretation would have put the brakes on the massive amounts of 'soft money' raised and spent for many party ads clearly promoting a particular candidate. While a suit challenging the FEC's dismissal of these MURs has been filed (Fulani v. FEC, No. 1:00CV01018 (WBB) (D.D.C., filed 5/8/00)), it has yet to be resolved.

E. Currently, party committees are required to allocate generic voter drive advertisements (11 C.F.R. § 106.5(a)(2)) and legislative ads that promote the party (Advisory Opinion 1995-25, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162). This means that a certain percentage of federally regulated funds ('hard money') must be used for such communications, e.g., 65% by a national party committee in a presidential election cycle. At the same time, though, 'soft money' may be used to pay for the rest. The ads used by the parties in the 1996, 1998, and 2000 cycles usually were allocated under these guidelines. A long pending suit challenges this allocation requirement and seeks a declaratory ruling that party committees should be able to use 'soft money' **alone** to pay for ads that could be characterized as 'issue ads.' Republican National Committee v. FEC, No. 98-CV-1207 (WBB) (D.D.C., filed 1998). A motion for a preliminary injunction was denied by the District Court, mem. op. 6/25/98, and by the Court of Appeals, No. 98-5263 (D.C. Cir. mem. op., 11/6/98). This suit has been placed on hold while the soft money and "electioneering communication" provisions of the Bipartisan Campaign Reform Act of 2002 are litigated. If this suit is revived and successful, not only would the coordinated expenditure limits be undermined by 'issue ads' that criticize or praise particular candidates; the allocation rules would be undermined, and the parties (perhaps at the state and local level only) would come to rely on 'soft money' even more.

VIII. **What will the FEC do with the Bipartisan Campaign Reform Act of 2002?**

A. Starting with the 2004 election cycle, the statute tries to prevent federal officeholders from soliciting soft money.

1. The FEC has ruled that suggesting a soft money donation be made is not solicitation. *See* Prohibited or Excessive Contributions: Non-Federal Funds or Soft Money, Final Rules and Explanation and Justification, 67 Fed. Reg. 49064, 49086 (July 29, 2002).

2. Further, it has ruled that although such officials may not solicit soft money before or after a state party event, they may do so at the event itself. *Id*. at 49107, 49108.

B. The statute tries to prevent agents of federal officeholders from soliciting soft money.

1. The FEC has ruled that a person who is an agent of a federal officeholder may nonetheless solicit soft money if he or she also is an agent of the state party and could be said to be soliciting the soft money on behalf of the state party. *Id*. at 49083.

2. The FEC has ruled that apparent authority is not an adequate basis for finding an agency relationship. *Id*. at 49082. (If President Nixon had told

his biggest donors, "Maurice Stans is my soft money guy," would such apparent authority not suggest liability for Stan's subsequent soft money solicitations?)

C. These are not signs that the FEC will apply the law rigorously. For corporations wishing to be free of soft money pitches, it seems that things will stay largely the same.

D. The statute tries to prevent corporations and unions from funding radio or TV 'issue ads' if a federal candidate is mentioned, the ad is run within 30 days of a primary or within 60 days of a general, and, for House or Senate races, the ad reaches at least 50,000 of the relevant electorate.

1. Indications are that several commissioners will seek to carve at least some exceptions. For example, grassroots legislative ads that do not promote, support, attack, or oppose a mentioned candidate may be allowed. Beyond that, there is room for mischief.

2. This part of the rulemaking was pending as of this writing, and the tentative plan was to allow public comment on draft rules from August 1-21, 2002. It currently is scheduled to be finalized at an FEC meeting on September 26, 2002.